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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY AND SOUTHERN CALIFORNIA EDISON COMPANY, AS AMICI CURIAE

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SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	1
Consent to filing	2
Question presented	2
Interest of the amici curiae	2
Statement of the case	7
Argument	8
I	
The decision of the Court below results in an infringement upon the constitutionally protected free speech rights of a utility and its customers	8
A. Prohibiting a utility from including its views on controversial issues relating to public policy in its billing envelope is a direct restraint upon free speech	8
B. New York is prohibited by the first amendment from determining what views of a utility a customer may receive	12
II	
There is no compelling governmental interest in prohibiting a utility from including "controversial matters of public policy" in its billing envelope	17
A. A state cannot decide for a utility and its customers what views are appropriate for inclusion in the billing envelope	17
B. Utility customers are not a "captive audience" needing government to protect the privacy of their homes from utility views on controversial matters of public policy	22
III	
Because a utility has a built-in method for disseminating information does not empower a state to limit the views that may be disseminated through that mechanism	28
Conclusion	34

TABLE OF AUTHORITIES CITED

Cases

	Page
Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945)	21, 30
Bates v. Little Rock (1960) 361 U.S. 516	9
Buckley v. Valeo (1976) 424 U.S. 1	7, 10, 17, 28
Cohen v. California (1971) 403 U.S. 15	22, 23, 24, 25, 26
Consolidated Edison Co. v. PSC (1979) 417 N.Y.S.2d 30	1, 7, 11, 15, 19, 22, 24, 25, 31
Elrod v. Burns (1976) 427 U.S. 347	17
Erznoznik v. City of Jacksonville (1975) 422 U.S. 205	24, 25, 26, 27
First National Bank of Boston v. Bellotti (1978) 435 U.S. 765	8, 12, 14, 16, 17, 21, 29, 33
Jackson v. Metropolitan Edison Company (1975) 419 U.S. 345	23
Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513	25, 31
Lamont v. Postmaster General (1965) 381 U.S. 301	15
Lehman v. City of Shaker Heights (1974) 418 U.S. 298	26
Louisiana v. NAACP (1961) 366 U.S. 293	9
Martin v. Struthers, 319 U.S. 141	25
Meyer v. Nebraska (1923) 262 U.S. 390	15
Miami Herald Publishing Co. v. Tornillo (1974) 418 U.S. 241	30, 31, 32
Mills v. Alabama (1966) 384 U.S. 214	10
NAACP v. Alabama (1958) 357 U.S. 449	9
NAACP v. Button (1953) 371 U.S. 415	17
New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)	17, 21, 32
Pacific Gas and Electric Company v. Berkeley (1976) 60 Cal. App.3d 123, 131 Cal.Rptr. 350	8
Police Department of Chicago v. Mosley (1972) 408 U.S. 92	8, 11, 12
Public Utilities Comm'n v. Pollak, 343 U.S. 451	25
Rowan v. Post Office Department (1970) 397 U.S. 728	19, 20, 21, 25, 26
Schneider v. State (1939) 305 U.S. 147	18
Shelton v. Tucker (1960) 364 U.S. 479	17
Stanley v. Georgia (1969) 394 U.S. 557	15

CASES

	Page
Thomas v. Collins (1945) 323 U.S. 516	9
Thornhill v. Alabama (1940) 310 U.S. 88	9, 15
Wellford v. Battaglia (Del. 1972) 343 F.Supp. 143	17

Constitution

United States Constitution: First Amendment	2, 5, 6, 7, 8, 9, 10, 12, 13, 15, 17, 18, 22, 32, 33, 34

Statutes

California Penal Code: Section 415	22
California Public Utilities Code: Section 453(d)	3, 4, 6, 13, 22, 31
Sections 2107-2113	22
28 U.S.C. Section 1257(2)	1
39 U.S.C. Section 4009	19

Texts

Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Column L Rev 960	25
"Legislature and Administrative Motivation In Constitutional Law" 79 Yale L.J. 1205	17
Note, "Less Drastic Means and the First Amendment" (1969) 78 Yale L.J. 464; Ely (1970)	17

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AS AMICI CURIAE

OPINION BELOW

The Opinion of the Court of Appeals of the State of New York is reported at (1979) 47 N.Y.2d 94, 390 N.E.2d 794, 417 N.Y.S.2d 30. The Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at (1978) 63 A.D.2d 364, 407 N.Y.S.2d 735. The Opinion of the New York Supreme Court, Albany County, is reported at (1978) 93 Misc.2d 313, 402 N.Y.S.2d 551.

JURISDICTION

The petition noting probable jurisdiction was filed on July 27, 1979, and probable jurisdiction was noted by this Court on October 2, 1979. This Court has jurisdiction under 28 U.S.C. section 1257(2).

CONSENT TO FILING

This Amici Curiae brief is being filed with the consent of all parties to the proceeding.

QUESTION PRESENTED

Whether a state may, consistent with the First Amendment to the United States Constitution, prohibit a utility from inserting "the utility's position on controversial matters of public policy" in its billing envelopes?

INTEREST OF THE AMICI CURIAE

Pacific Gas and Electric Company (PGandE) is one of the world's largest investor-owned combined gas and electric utilities. Incorporated in 1905, PGandE services 48 of California's 58 counties (electric—47, gas—37), operates 12 thermal plants and 64 hydroplants generating in excess of 10 million kw. With over 6 million gas and electric customers, PGandE has a great need to communicate with its customers on numerous matters relating, inter alia, to its ability to serve them in a reliable and efficient manner.

Since December 1923, PGandE has published a monthly newsletter called *PG&E Progress* (*"Progress"*) to communicate with its customers. In its first issue, PGandE stated the purpose of *Progress:*

> The aim of the company has been to win the public good will by deserving the public good will. . . . To this end, the company will never hesitate to "speak up" and tell its story in order that the public it serves may know and understand its purposes, its accomplishments and its policies. The "Progress" is put forth as a natural and logical development of the old and tried

> policies of the company. It will be primarily a journal of fact. It will record the growth of the state and the territory the company serves, the growth of the hydroelectric industry, the development plans of the company—the problems involved in building the Commonwealth of Destiny. It will present the facts involved in financing and operating the great gas and electric industries, and any and all other facts which may prove useful and serviceable to the public.

Today, *Progress,* which is printed at stockholder expense has a total circulation of 3,549,631 and is mailed each month to customers in the billing envelope at no additional cost. The choice of receiving *Progress* is that of each customer —each edition of *Progress* contains language informing the customer of the right not to have *Progress* mailed with the bill.

In 1975 the California Legislature enacted a statute somewhat similar to the New York Public Service Commission's (PSC) order at issue in this case. That statute, which is now section 453(d) of the California Public Utilities Code (section 453(d)), reads as follows:

> No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state,

or local legislation or regulations; provided that until December 31, 1976, any such prohibitions shall not apply to any notice or statement relating to matters affecting rates or service to customers or subscribers where the public utility has requested and received the prior approval of the commission.

Today, energy continues to be of extremely critical concern not only to California but to the entire nation. Considerable debate has taken place and continues to take place about our energy future. In short, energy has become of such vital concern that it impacts significantly almost every aspect of our economy. Governmental regulations as well as other governmental policies have made supplying energy substantially more complex.

Now, more so than ever before in the history of this country, there is an urgent need for utilities to communicate to customers on every aspect of this critical subject. However, because of section 453(d) PGandE is precluded from printing many of its views in *Progress* on nuclear power and other sources of energy because some of those views may be interpreted as being *designed* or *intended* "to promote or defeat [a] change in federal, state or local legislation or regulations . . ." on energy since *Progress* is mailed with the customer's bill.[1]

The net effect of section 453(d) has been to foreclose PGandE from communicationg with its customers on many matters that are essential to its ability to meet their future

[1]The postage alone for separately mailing *Progress* first class would cost almost $500,000 per month. Rather than incur this huge cost, PGandE has elected not to express its views in *Progress* on many critical energy matters relating to the Company's ability to meet its obligation to supply adequate energy to its customers.

energy needs. Accordingly, PGandE is extremely concerned about the resolution of this current case especially since the decision could probably determine, to a significant extent, its constitutional right to communicate through *Progress* important information to customers on such crucial matters as energy. Moreover, this case raises very basic and essential First Amendment issues which strike at the core of free speech. Affirmance of the New York court's decision, allowing government to control the content of the billing envelope of a private corporation, would strike a severe blow to the concept of free speech.

San Diego Gas & Electric Company (SDG&E) is an investor-owned public utility principally engaged in generating and distributing electricity and in distributing natural gas. Its service territory includes 90 communities located in San Diego County and in adjoining portions of Orange County to the North and a small section of Imperial County to the East. SDG&E currently serves approximately 740,310 electric service customers, approximately 486,564 gas service customers and, in addition, provides steam and cooling services to more than 60 industrial operations either directly or through its wholly owned subsidiaries.

In the past SDG&E has often placed informational material such as an explanation of the bill and safety and conservation measures in the same envelopes in which it has mailed bills to customers, and has recently included a monthly four-page periodical entitled "Lite Lines." "Lite Lines" provides a variety of information to customers regarding the availability of power, the power supply sys-

tem, consumer tips, services offered by the Company to its customers and Company policy directly affecting customers. "Lite Lines" and most of the other materials included in the envelopes with customer bills are paid for by the shareholders of SDG&E, not by its customers.

Because of section 453(d), which is somewhat similar to the PSC order in the instant case, SDG&E's ability to communicate (in "Lite Lines") to its customers on a variety of important policy matters has been severely hampered.

Southern California Edison Company ("SCE") is an investor-owned electric utility serving approximately eight million customers in a 50,000 square mile service territory. As a California utility, regulated by the California Public Utilities Commission, SCE is expressly prohibited by section 453(d) from including materials of a political nature or which may be considered to be intended or designed to influence governmental action in its billing envelopes.

The decision below is a direct violation of a utility's First Amendment right to speak and its customers' First Amendment right to listen. The restraint imposed by the PSC on these important First Amendment freedoms was predicated on the notion that New York may determine when a utility can speak based on PSC's assessment of whether the issue is "controversial."

On the other hand, section 453(d)'s prohibition on a utility's right to communicate with its customers by literature in the billing envelope is also a direct prohibition upon free speech, but it is not so subtle. The statute unilaterally, without reference to the "controversiality" of the subject

matter, forbids a utility from disseminating information on any ballot measures, candidates, or appointments on a local, state, or national level through its billing envelope. California's prohibition on a utility's right to engage in the free trade in ideas is absolute and cannot seriously be considered "closely drawn to avoid unnecessary abridgement. . . ." *Buckley v. Valeo* (1976) 424 U.S. 1, 25. Thus, PGandE, SDG&E and SCE fervently believe that the issues decided in the instant case will have a significant impact on the First Amendment rights of every utility in California.

STATEMENT OF THE CASE

In 1977, the New York Public Service Commission (PSC), in exercising its regulatory and supervisory powers over public utilities licensed to operate in that state, ordered Consolidated Edison Company (Con Edison) to "discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy." (*Consolidated Edison Co. v. PSC, supra,* at p. 33.)

The rationale set forth by PSC for its ban was that: "We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues . . . is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the utility's message." (*Id.* at p. 33.)

Utilizing bill inserts to inform customers of a utility's position on "controversial matters of public policy" is an effective, economical and reasonable method for a utility to communicate with its customers. In holding the bill insert ban unconstitutional, Special Term of the Supreme

Court of New York found that the ban was a restriction on speech not justified by a compelling state interest and rejected PSC's captive audience argument.

The Appellate Division, Third Department, reversed the judgment of Special Term and held PSC's order to be constitutional; and upon appeal by Con Edison to the Court of Appeals of New York, that court upheld the Appellate Division, stating that PSC's ban was not a content-based regulation even though it was directed solely at the content of the message sought to be communicated.

ARGUMENT

I

THE DECISION OF THE COURT BELOW RESULTS IN AN INFRINGEMENT UPON THE CONSTITUTIONALLY PROTECTED FREE SPEECH RIGHTS OF A UTILITY AND ITS CUSTOMERS

A. Prohibiting A Utility From Including Its Views On Controversial Issues Relating To Public Policy In Its Billing Envelope Is A Direct Restraint Upon Free Speech

Under the First Amendment, a corporation has a right to communicate its views on all subjects without the government picking and choosing the subjects that are acceptable for the public to hear. (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765; see also *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92; *Pacific Gas and Electric Company v. Berkeley* (1976) 60 Cal.App.3d 123, 131 Cal.Rptr. 350.) Since First Amendment freedoms occupy a "preferred position," they cannot be infringed unless the state shows a compelling state interest in curbing them.[2] (See *Louisiana v. NAACP* (1961) 366 U.S. 293; *Bates v. Little Rock* (1960) 361 U.S. 516; *NAACP v. Alabama* (1958) 357 U.S. 449.)

In fulfilling its public utility duty, a utility has a responsibility to communicate with its customers on many subjects that may well be considered by some segments of society to be "controversial." For example, that duty may involve informing customers about the need for conservation, the adequacy of energy supplies, the future sources of energy, the relationship between services and rates, customer safety and similar matters. Although some of these matters may, indeed, be considered by some to be

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[2]This Court has on occasions too numerous to mention affirmed that First Amendment freedoms are essential for all in a democratic society. For as stated in *Thornhill v. Alabama* (1940) 310 U.S. 88, 95-96:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be *exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.* Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. [Emphasis added.]

Five years later, this Court in *Thomas v. Collins* (1945) 323 U.S. 516, 537 left no doubt that:

> The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. Cf. *Abrams v. United States*, 250 U.S. 616, 624 (1919), and *Gitlow v. New York*, 268 U.S. 652, 672 (1925), dissenting opinions of Mr. Justice Holmes. Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

"controversial," they are, nevertheless, genuine public issues often debated during this current energy crisis. However, under the ruling of the court below, materials relating to these subjects, because they may be considered "controversial," could not be included with the customer's bill, even though many customers are desirous of receiving such information from the utility.

The underlying premise of the New York rule prohibiting the inclusion of certain views with a customer's bill is that government should limit a customer's exposure to a utility's views on certain public issues. But this Court has always prohibited government's interference with the free discussion of governmental affairs. For example, in *Mills v. Alabama* (1966) 384 U.S. 214, 218, it was observed that "there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs."

More recently, this Court in *Buckley v. Valeo, supra,* at 49, emphasized that ". . . the First Amendment . . . was designed to 'secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.'" Yet, New York, by its police powers, would stifle the unfettered interchange of ideas by regulating the content of a utility's billing envelope.

Notwithstanding the fact that PSC's banning certain materials from the billing envelope clearly was content-based, the Court of Appeals of New York, nevertheless, erroneously concluded otherwise, stating: "No one viewpoint is singled

out for special treatment. . . ." (*Consolidated Edison Co. v. PSC* (1979) 417 N.Y.S.2d 30, 36.) To the contrary, it is clearly content-based because the viewpoint of a utility is singled out for special treatment when that viewpoint touches upon "controversial matters of public policy." In other words, any views of a utility may be expressed through the billing envelope as long as those views do not relate to matters of controversy dealing with public policy.

As pointed out by this Court in *Police Department of Chicago v. Mosley, supra,* at page 96: "There is an 'equality of status in the field of ideas' and government must afford all points of views an equal opportunity to be heard. . . ." Yet the New York court would allow non-controversial views to be included in the billing envelope. And, it would permit controversial views to be disseminated in the billing envelope as long as they do not represent the position of the utility.

However, discriminating against ideas that may be expressed strikes at the very core of our system of government. It is direct regulation of the content of speech because it permits government to determine whose views relating to public policy may or may not be included in the billing envelope. In *Mosley,* this Court spoke against discrimination based upon the content of speech and the person desiring to speak:

> Necessarily then . . . not to mention the First Amendment itself, *government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.* And it may not select which issues are worth discussing or debating. . . . Once a

> forum is opened up to assembly or speaking by some groups, *government may not prohibit others from assembling or speaking on the basis of what they intend to say.* Selective exclusions . . . may not be based on content alone, and may not be justified by reference to content alone. [*Id.*, at p. 96; emphasis added.][3]

It seems quite clear that the New York court would allow a utility to include any materials of its choosing in the billing envelope as long as that material is considered non-controversial. Moreover, New York would allow a utility to include controversial views on public policy from any source so long as such views did not support the position of the utility. This is unquestionably content-based, governmental regulation directed solely at utility speech which, in the absence of a compelling interest, is prohibited by the First Amendment.

B. New York Is Prohibited By The First Amendment From Determining What Views Of A Utility A Customer May Receive

In a democratic society, it is imperative that people have the right, free of governmental veto, to receive information

[3]Just recently, this Court, citing *Mosley*, again in *First National Bank of Boston v. Bellotti, supra*, reaffirmed that government may not dictate the subjects about which persons may speak:

> In the realm of protected speech, *the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speaker who may address a public issue* [citation omitted]. If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel expression of views is unacceptable under the First Amendment. [*Id.*, at pp. 784-785, emphasis added.]

on all subjects.[4] As Professor Tribe has observed: "A right to speak may be said to exist when the Court will not allow government to justify a restriction on expressive conduct by a claim that the ideas or information expressed are dangerous; that the speaker may exercise liberty of expression in some other place, time, or manner; or that the speaker should be muffled in order that a diversity of viewpoints might be heard in the marketplace of ideas." (*Tribe,* American Constitutional Law, 1978 at p. 675.) Unfortunately, the court below, in erroneously concluding that the restriction was a time, place and manner regulation, completely ignored the right of customers to receive the viewpoints of a utility on controversial matters of public policy in the billing envelope.[5]

Customers, as consumers of utility services, need to be aware of what the utility has to say about issues of public concern which may affect the future supply of energy or other matters that may impact the future of the utility or the customer. As a minimum, the First Amendment guarantees a utility customer "access to discussion, debate, and

[4]PGandE serves over 9 million customers many of whom enjoy reading its monthly publication *Progress*. Many customers desire having information on all future sources of power, but because of section 453(d) such information may not be printed in *Progress* because it is mailed in the billing envelope. Moreover, if political matters vital to the future supply of energy are discussed in *Progress*, it may not, because of section 453(d), be included in the billing envelope even though customers may want to read the views of supplier of their energy so that they may properly evaluate the current energy situation.

[5]PGandE has printed in each issue of *Progress* the following: "Mailing list additions or deletions may be made by writing to PGandE office giving name, address and account number." Thus, if a person notifies PGandE not to include *Progress* in his billing envelope, it is not included therein.

the dissemination of information and ideas."[6] *First National Bank of Boston v. Bellotti, supra.* (*Id.,* at p. 783.)

For it is a fundamental premise of democracy that the people are presumed to have a certain amount of intelligence, and that they will be able, without governmental interference, to evaluate materials and make their own decisions about their worth:

> Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. *They may consider in making their judgment the source and creditability of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the framers of the First Amendment.* [*First National Bank of Boston v. Bellotti, supra,* at p. 791-792, emphasis added.]

Furthermore, in *First National Bank of Boston v. Bellotti, supra,* this Court specifically rejected the paternalistic approach adopted by the court below. As stated by the *Bellotti* Court:

> Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to gov-

[6]New York would take from utility customers this cherished right —essential to a democracy—to read and evaluate all views of a public utility and decide the worth of such views for themselves. Almost 40 years ago, this Court cautioned against such governmental intrusions into the rights of the people:

> The freedom of speech and of the press guaranteed by the Constitution embrace at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues* about which information is needed or appropriate to enable members of society to cope with the exi-

> ern themselves. See *Thornhill v. Alabama,* 310 U. S. 88, 95, 60 S.Ct. 736, 740, 84 L.Ed 1093 (1940); Meiklejohn, The First Amendment is an Absolute, 1961 S.Ct. Rev. 245, 263. The *First Amendment rejects the "highly paternalistic" approach of statutes . . . which restrict what people may hear. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S., at 770, 96 S.Ct., at 1829; see *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S., at 97, 97 S.Ct., at 1620; *Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed 1095 (1927) (Brandeis, J., concurring); *Abrams v. United States,* 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed 1173 (1919) (Holmes, J., dissenting). [*Id.,* at p. 791, n. 31; emphasis added.]

In the present case, the court below, regardless of how noble its purpose, erred in upholding the state's alleged interest in vindicating "the privacy rights of utility customers," (*Consolidated Edison Co. v. PSC, supra,* at 36) by cutting off their right to receive the utility's viewpoint on "controversial" matters. Government cannot deny utility

> gencies of their period. [*Thornhill v. Alabama* (1940) 310 U.S. 88, 101-102; emphasis added.]

The court below, in ignoring the rights of customers, noted that Con Edison has the right to express its ideas in other forums. (*Consolidated Edison Co. v. PSC, supra,* at 36.) But the constitutional right to know means more than saying a customer may in other forums obtain the utility's views. For such a right to be meaningful, a customer must be able to receive information without governmental veto or interference with the content. See, e.g., *Meyer v. Nebraska* (1923) 262 U.S. 390 where the Court reversed a conviction for violating a state law by teaching German because the law interfered "with the opportunities of pupils to acquire knowledge." See also *Stanley v. Georgia* (1969) 394 U.S. 557 invalidating a statute which made it a crime to possess pornographic materials in one's own home. In *Lamont v. Postmaster General* (1965) 381 U.S. 301, this Court held that the First Amendment right to receive information was violated by a congressional requirement that persons wishing to receive mail from foreign government organizations publicly identify their wishes to do so.

customers their individual choice of deciding and evaluating for themselves the worth of materials received in the billing envelope.[7]

Even if New York's interest in protecting the sensibilities of utility customers from a utility's controversial views on public policy is a legitimate one, it makes absolutely no sense to ban those views from the billing envelope, if the utility can directly mail these same views to the customer in a separate envelope. In other words, if the views are truly offensive, they will remain offensive regardless of whether they reach the customer in the billing envelope or in a separate envelope. Hence, even if mailed separately, the customer's sensibilities should be equally aroused, and the protection allegedly afforded by banning the offensive material from the billing envelope would be at most illusory.

[7]"The inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual." [*First National Bank of Boston v. Bellotti, supra,* at p. 777.] Moreover, continued the Court: "Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' T. Emerson, Toward a General Theory of the First Amendment 9 (1966). See also A. Meiklejohn, Free Speech and Its Relation to Self-Government 24-26 (1948)." [*Id.*, at p. 777, n. 11.]

II

THERE IS NO COMPELLING GOVERNMENTAL INTEREST IN PROHIBITING A UTILITY FROM INCLUDING "CONTROVERSIAL MATTERS OF PUBLIC POLICY" IN ITS BILLING ENVELOPE

A. A State Cannot Decide For A Utility And Its Customers What Views Are Appropriate For Inclusion In The Billing Envelope

Attempts by New York to invade the billing envelope and extract therefrom controversial material relating to public policy strikes at the very heart of the First Amendment and must withstand strict or exacting scrutiny because such invasion is directed at speech itself (see *Buckley v. Valeo, supra,* and New York cannot prevail unless it shows "a subordinating interest which is compelling."[8] (*First National Bank of Boston v. Bellotti, supra* at 786.) Even if New York could show a compelling interest, which it has not shown, it must still employ means "closely drawn to avoid unnecessary abridgement. . . ." (*Buckley v. Valeo, supra,* at 25; see also *Shelton v. Tucker* (1960) 364 U.S. 479.)

[8]The burden of showing a compelling state interest so fundamental and overriding as to necessitate prohibiting a utility from disseminating its views in the billing envelope lies with the state. (*Elrod v. Burns* (1976) 427 U.S. 347; *NAACP v. Button* (1953) 371 U.S. 415, 438-439; *Welford v. Battaglia* (Del. 1972) 343 F.Supp. 143, 145; see also, Note, "Less Drastic Means and the First Amendment" (1969) 78 Yale L.J. 464; Ely (1970) "Legislature and Administrative Motivation In Constitutional Law" 79 Yale L.J. 1205.)

The fundamental purpose underlying the free speech guarantee is the national commitment to the principle "that debate on public issues should be uninhibited, robust and wide-open" (*New York Times v. Sullivan* (1964) 376 U.S. 254, 270), so that the public may be informed and educated on all views regardless of content or source.

The basic fallacy of the New York court's reasoning is its unwarranted assumption that the mere receipt of "controversial" information relating to public policy "is likely to offend the sensibilities of the recipient" and that the state "need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them" (*Id.*, at p. 36.) As a practical matter, no harm can be demonstrated by the mere receipt of "controversial" information in the billing envelope.[9] Customers are not forced to read the information; the choice is theirs to read or discard the information. Under the disguise of protecting utility customers, government cannot, consistent with the First Amendment, take from utility management the decision as to what materials may be inserted with a customer's bill, unless a compelling governmental interest can be clearly shown and there are no less drastic alternative means.[10]

To support its conclusion that "when the insert espouses the utility's viewpoint on a controversial question, it is as

[9]PGandE's *Progress* is a separate insert which is in no way attached to or a part of the customer's bill.

[10]See *Schneider v. State* (1939) 305 U.S. 147 where the court invalidated an anti-handbill ordinance as applied to distributors of labor, political and religious circulars despite the state's legitimate interest in minimizing litter, noise and traffic congestion and protecting people from fraud and invasion of privacy. (*Id.*, at 158, 160, 164.) As the Court pointed out: "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." (*Id.*, at 162.) Moreover, continued the Court: "Fraud may be ... punished by law. Trespass may similarly be forbidden." (*Id.* at 162) There is no indication that any of the material banned from the billing envelope in this case is false or misleading. If New York really wants to help protect utility customers from certain utility views, the proper procedure would be to permit the *customer* to inform the utility of his desire not to receive utility inserts with his bill.

likely to offend the sensibilities of the recipient as it is to elicit agreement" (*Consolidated Edison Company v. PSC, supra*, at 36), the New York court improperly relied upon *Rowan v. Post Office Department* (1970) 397 U.S. 728. *Rowan* involved a challenge to a federal statute which provided that a person who has received, by mail, a "pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," (39 U.S.C. § 4009) may request the Postmaster General to issue an order "directing the sender and his agents or assigns to refrain from further mailings to the named addressee." (39 U.S.C. § 4009.) In upholding the constitutionality of that statute, this Court noted that a vendor does not have a constitutional right to send unwanted material into someone's home, and that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. (*Rowan v. Post Office Department, supra*, at pp. 736-737.)

Clearly, *Rowan* does not support the New York court's conclusion that the government may, as was done by the PSC in the present case, decide what materials may "offend the sensibilities" of recipients of such materials and therefore ban the materials from the billing envelope. To the contrary, *Rowan* supports the proposition that it is the *customer* not the government, who should decide what material he wishes to receive. The danger of allowing government to make that choice was expressly recognized by this Court in *Rowan*:

> Both the absoluteness of the citizen's right under Section 4009 and its finality are essential; *what may not be provocative to one person may well be to an-*

other. In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise. *Congress provided the sweeping power not only to protect privacy, but to avoid constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.* [*Rowan v. Post Office Department, supra,* at 737; emphasis added.]

If *Rowan* is in any way applicable to the present case, it clearly stands for the proposition that it is the *utility customer*, not PSC, who has the discretion to determine what may offend his or her sensibilities. To make clear that the choice was the individual's and not the government's, the *Rowan* Court stated: "The section was intended to allow the *addressee* complete and unfettered discretion in *electing* whether or not he desired to receive further material from a particular sender." (*Id.*, at 734; emphasis added.)

Unlike the situation in the *Rowan* case, PSC in the present case has taken from the utility customers the right to decide whether they want to receive with their bills controversial materials. By its paternalistic desire to shield utility customers from utility views on certain matters, the PSC has taken from the customer the "complete and unfettered discretion in electing whether or not [the customer] desired to receive . . . material from a particular sender" (*Id.*, at 734) and invested that "complete and unfettered discretion" in itself. This usurpation of the right to decide what may be received by a utility customer is in

direct conflict with the *Rowan* decision. *Rowan* never intended to give government the exclusive power to decide what views a utility customer may receive with his bill.

In essence, New York in order to protect the minds of utility customers seeks to extract from the billing envelope all views of utilities which touch upon controversial matters relating to public affairs. Mr. Justice Powell, speaking for this Court in *First National Bank of Boston v. Bellotti, supra,* clearly stated that speech which relates to public affairs is essential to self-government:

> The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge. See G. Gunther, Constitutional Law 1044 (9th ed. 1975); T. Emerson, The System of Freedom of Expression 6 (1970). *The Court has declared, however, that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed. 2d 125 (1964). *And self-government suffers when those in power suppress competing views on public issues "from diverse and antagonistic sources." Associated Press v. United States,* 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945), quoted in *New York Times Co. v. Sullivan,* 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964). [*Id.*, at 777, n. 12; emphasis added.]

Accordingly, there is no compelling interest for New York's suppression of utility views on controversial matters of public policy and the right of customers to receive such views in their billing envelope.

B. Utility Customers Are Not A "Captive Audience" Needing Government To Protect The Privacy Of Their Homes From Utility Views On Controversial Matters Of Public Policy

In upholding the prohibition at issue in the present case, the New York court also cited *Cohen v. California* (1971) 403 U.S. 15 as support for the government's position that utility customers are a "captive audience" needing the state to protect the privacy rights of their homes. (*Consolidated Edison Co. v. PSC, supra,* at 36.) This reliance upon *Cohen* is misplaced. In *Cohen* a defendant was convicted of violating section 415 of the California Penal Code which at that time prohibited "maliciously and willfully disturbing the peace and quiet of any neighbor or person . . . by . . . offensive conduct." (*Id.*, at 20.) Cohen was arrested for wearing a jacket bearing the words "FUCK THE DRAFT" in a corridor of the Los Angeles County Courthouse. In reversing his conviction, this Court stated that, absent a more particularized and compelling reason for its action, California could not, consistent with the First Amendment, make the simple public display of the single, four-letter expletive a criminal offense.[11] (*Cohen v. California, supra,* at 21.)

Contrary to the apparent belief of the court below, *Cohen* does not support the claim that utility customers are a "captive audience" needing governmental protection from utility views on matters of controversial public policy

[11]Just as in the *Cohen* case, it is a criminal offense for a California utility to include materials of a political nature, in the billing envelope even if the material directly relates to the utility's ability to operate. (See section 453(d) and sections 2107-2113 of the California Public Utilities Code.

invading their homes. To justify the interference with the free flow of information, even into the privacy of the home, this Court emphasized in *Cohen* that the government must show a substantial privacy invasion of a magnitude that cannot be tolerated:

> While this court has recognized that government may properly act in many situations to prohibit intrusions into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue [citation omitted], we have at the same time consistently stressed that "we are often 'captive' . . . and subject to objectional speech" [citation omitted]. *The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.* Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. [*Cohen v. California, supra,* at 21; emphasis added.]

In *Cohen,* this Court noted, as must be noted here, that people in the Los Angeles courthouse could avoid further bombardment of their sensibilities by simply averting their eyes. Upon receipt of a utility's bill inserts (which can in no way be equated with the visual impact of the words on Cohen's jacket), a customer may choose to read the materials or discard any part thereof or request that such material not be mailed with the bill.[12] However, the court

[12]The fact that utilities provide a public service and are subject to an extensive regulatory scheme cannot serve as a justification for divesting them of their right to communicate freely their views to their customers without governmental control of the content of their billing envelopes. (Cf. *Jackson v. Metropolitan Edison Company* (1975) 419 U.S. 345.)

below would deny a customer the opportunity to make that choice and would empower the government to decide for each customer which views of the utility are acceptable for the billing envelope. The Cohen Court rejected this approach:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. *It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us,* in the hope that use of such freedom would ultimately produce a more capable citizenry and more perfect policy and in the belief that no other approach would comport with the promise of individual dignity and choice upon which our political system rests [citation omitted]. [*Cohen v. California* at p. 24; emphasis added.]

Erznoznik v. City of Jacksonville (1975) 422 U.S. 205, also cited by the court below for its contention that: "Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment [citations omitted],"[13] (*Con-*

[13]According to the court below:

> Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word * * * a different or more preferred status because [it is] sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate of-

solidated Edison Company v. PSC, supra, at 37), does not support its position. *Erznoznik* involved a statute that made it a public nuisance and a punishable offense for a drive-in movie theatre to exhibit films containing nudity when the screen was visible from a public street or place. As observed by the Court in *Erznoznik;*

> *Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers consider them especially offensive to passersby.*
>
> This Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts [citations omitted]. Such cases demand delicate balancing because:
>
> > "In th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interest of both sides are plainly rooted in the traditions and significant concerns of our society. [citation omitted]" [*Erznoznik v. City of Jacksonville, supra,* at p. 208-209 emphasis added.]

Similar to the Erznoznik case, the PSC's ban in the present case does not protect utility customers from all

fensively with another" (*Rowan v. Post Office Dept.*, 397 U.S. 728, 737; see, also, *Martin v. Struthers,* 319 U.S. 141; Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum L Rev 960). A governmental agency such as the PSC may take appropriate steps to protect this privacy right of its constituents (*Kovacs v. Cooper, supra* at pp 86-89; *Cohen v. California,* 403 U.S. 15, 21-22; see, also, *Public Utilities Comm'n v. Pollak,* 343 U.S. 451, 466-469) [Douglas, J. dissenting]). [*Consolidated Edison Co. v. PSC, supra,* at 36-37.]

materials that might offend their sensibilities, but rather singles out a utility's position on matters of "public policy" that the government, in its discretion, determines to be controversial.[14] In *Erznoznik,* this Court rejected the idea that government, except in very narrow circumstances,[15] may selectively "shield the public from some kinds of speech on the grounds that they are more offensive than others. . . ."[16] (*Id.*, at 209.) Moreover, the Court observed that:

> *The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and*

[14]Some customers do not believe there is a need to conserve energy and do not want to be reminded of the need to conserve energy. For example, some customers might be offended by being informed they should not heat their swimming pools at certain times. Because of vast differences in people, what offends the "sensibilities" of one customer may very well be information badly wanted by other customers.

[15]One such circumstance is when the speaker intrudes on the privacy of one's home as in *Rowan v. Post Office Department, supra,* where the court indicated it is within the discretion of the homeowner or recipient (as opposed to the government) to inform the Post Office of the desire not to receive certain offensive mail. Another circumstance is where a person cannot avoid the materials by simply averting his eyes as was the case in *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, where the issue was the posting of campaign posters inside city-owned buses. The rider on the bus in *Lehman* had no choice but be exposed to the posters. He could not avoid them by averting his eyes as in *Cohen.* In the case of utility bill inserts, a customer may simply elect to throw away the unwanted materials without reading them.

[16]The Court also observed:

> Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. See *Kovacs v. Cooper, supra; Cox v. Louisiana,* 379 U.S. 536, 554 (1965); *Adderley v. Florida,* 385 U.S. 39 (1966). But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g., Police Dept. of Chicago v. Mosley,* 408 U.S. 92 (1972); *Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Kovacs v. Cooper,*

> *ingenious forms of expression, "we are inescapably captive audiences for many purposes." Rowan vs. Post Office Department, supra,* at 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, *the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.* Rather, absent the narrower circumstances described above, *the burden normally falls upon the viewer to "avoid further bombardment of* [*his*] *sensibilities simply by averting* [*his*] *eyes.* [citations omitted]" [*Erznoznik v. City of Jacksonville, supra,* at 210-211; emphasis added.]

In the present case, no assistance is needed from the government since the customer may discard the materials and thus protect himself simply by not reading the utility's "controversial" views on public policy. On the other hand, if a customer does want to know the utility's position on a "controversial" subject that affects him or the utility, that customer would have the opportunity without government censorship to read and evaluate what the utility has to say. Therefore, there is no conceivable compelling governmental interest or rational reason for New York's alleged interest in vindicating the privacy rights of utility customers.

supra, at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, [citation omitted] or the degree of captivity makes it impractical for the unwilling viewer to avoid exposure. [citation omitted] [*Erznoznik v. City of Jacksonville, supra,* at 209.]

III

BECAUSE A UTILITY HAS A BUILT-IN METHOD FOR DISSEMINATING INFORMATION DOES NOT EMPOWER A STATE TO LIMIT THE VIEWS THAT MAY BE DISSEMINATED THROUGH THAT MECHANISM

Underlying New York's attempt to scrutinize materials that are included with a customer's bill is the assumption that since a utility has an institutional method for disseminating its views (the billing envelope), government has an interest in controlling the views that may be expressed through this medium. Stated simply, New York's intent is to prevent a utility from utilizing its built-in mechanism for disseminating its views since others do not have equal means of disseminating their views.

While this seemingly "noble" governmental purpose may appear reasonable, it collides head-on with the First Amendment. Restricting the speech of those who have the means of expressing their ideas so as not to place persons with less effective means of communicating their views at a disadvantage, has been expressly rejected by this Court. (*Buckley v. Valeo, supra,* at 48-49.) Moreover, not only the concept of equalizing the voices of others has been rejected, but also the idea of suppressing advocacy by those with means of communicating, because others do not have equal means of advocacy, has been rejected. (*Buckley v. Valeo, supra,* at 48-49.)

Some utilities, as other corporations, utilize their billing envelopes to communicate with their customers. This is an economical, reasonable and effective means of reaching a very diverse and wide audience. Separate mailings to

customers would be duplicative, and in many instances, because of the high costs of such mailings, would not be feasible. Denying a utility the use of its mechanism for communicating what it advocates, because it may "unduly persuade" others, also has been rejected. As correctly stated in *First National Bank of Boston v. Bellotti, supra,* ". . . the fact that advocacy may persuade . . . is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp. v. Regents,* 360 US, at 689, 3 L Ed 2d 1512, 79 S Ct 1362." (*Id.,* at 791.)

Limiting the speech of some to enhance the voices of others has been expressly rejected:

> *But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " New York Times Co. v. Sullivan, supra, at 266, 269, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412, quoting Associated Press v United States, 326 US 1, 20, 89 L Ed 2013, 65 S Ct 1416 (1945) and Roth v. United States, 354 US, at 484, 1 L Ed 2d 1498, 77 S Ct 1304, 14 Ohio Ops 2d 331. The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. Eastern R. Conf. v. Noerr Motors, 365 US 127, 139, 5 L Ed 2d 464, 81 S Ct 523 (1961). [*Buckley v. Valeo, supra,* at 48-49; emphasis added.]

By dictating the content of the billing envelope, New York is, in effect, determining the ultimate messages communicated to utility customers, and thereby forcing utilities not to print matters that they wish to print. This control over matters to be printed by utilities is constitutionally objectionable, and cannot be justified by asserting that there are alternative means of communicating available to utilities. In *Miami Herald Publishing Co. v. Tornillo*,[17] (1974) 418 U.S. 241, 256, Mr. Chief Justice Burger, writing for the Court observed: "We see that beginning with *Associated Press v. United States, supra* [326 U.S. 1 (1945)] the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government . . . to print that which it would not otherwise print."[18]

In the instant case, the court below took the untenable position that because the PSC's ban left open other avenues of expression to the utility it was a legitimate state function to prescribe the content of the billing envelope.[19] How-

[17]The issue in *Tornillo* was whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violated the guarantees of a free press.

[18]The *Tornillo* opinion also pointed out: "Dissenting in *Pittsburgh Press Co.* [*v. Human Relations Comm'n*, 413 U.S. (1973)], Mr. Justice Stewart, joined by Mr. Justice Douglas, expressed the view that 'no government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot.' *Id.*, at 400. See *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F. 2d 133, 135 (CA9 1971)". [*Miami Herald v. Tornillo, supra*, at 255-256.]

[19]According to the New York court:

> There is no doubt but that the regulation leaves open numerous alternative means of communication. On its face, the ban only reaches expressional activity conducted through the billing envelope. Whatever other modes of speech were open to utilities prior to the effective date of the commission order remain

ever, arguing that the ban leaves open numerous alternatives cannot withstand constitutional challenge. In essence, such an argument says that a utility is free to communicate its "controversial" views in any other manner it desires so long as the billing envelope is not utilized. But denying a utility the use of its readily available mechanism for communicating and compelling it to seek alternative means of communicating its "controversial" speech on public policy matters exacts a penalty based upon the content of the speech. (See *Miami Herald Publishing Co. v. Tornillo, supra,* at 256.)

Prohibiting a utility from utilizing its institutional method for mailing its views if they contain controversial matters of public policy clearly takes from the utility the discretion to determine the contents of its publication. Faced with the prospect of having to seek alternative and more expensive means of disseminating its publication, if controversial matters of public policy are included therein, the utility "might well conclude that the safe course is to avoid controversy." (Id., at 257.) This is true especially in California because of the criminal penalty assessable pursuant to section 453(d) if a utility elects to assert its views on matters of public policy in any publication it wishes to include in the billing envelope.

Rather than run the risk of incurring governmental sanction for espousing ideas on public policy that the government considers controversial, a utility must act as

> available. That the cost of utilizing these alternative channels may be higher is not determinative, especially where, as here, petitioner has wholly failed to demonstrate that it will be effectively precluded from exercising its rights (see e.g., *Kovacs v. Cooper*, 336 U.S. 77, 88-89, 69 S.Ct 448, 93 L.Ed 513, *supra*). [*Consolidated Edison Co. v. PSC, supra,* at 36.]

a self-censor, expressing only those views which it feels do not touch upon what the government may consider to be controversial matters of public policy. This fear of governmental sanction "dampens the vigor and limits the variety of public debate," (*New York Times v. Sullivan, supra,* at 279; see also *Miami Herald Publishing Co. v. Tornillo, supra,* at 257.) and exacts a penalty based upon content if a utility uses its readily available facilities to communicate certain ideas.

In *Tornillo* a state statute which exacted a penalty on the basis of content was invalidated:

> The Florida statute exacts a penalty on the basis of the content. . . . The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available. [*Id.,* at 256-257.]

Although a utility is not a newspaper, the First Amendment is by no means limited to newspaper publishers but rather applies to all who seek to express their ideas. In other words: " '[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in this right to print what they will as well as to utter it. . . . the liberty of the press is no greater and no less . . . than the liberty of every citizen of the

Republic' *Pennekamp v Florida,* 328 U.S. 331, 364, 90 L Ed 1295, 66 S Ct 1029 (1946) (Frankfurter, J., Concurring)" (*First National Bank of Boston v. Bellotti, supra,* at 802 [Burger, C.J., Concurring].) Thus, New York's attempt to exact a penalty from utilities when they speak on certain public policy matters, merely because they have effective and economical means for disseminating their views, is contrary to the principles of the First Amendment.

CONCLUSION

Amici Curiae respectfully urge this Court to reaffirm the fundamental principle that free speech means that government cannot pick and choose the views that may be disseminated to utility customers. The First Amendment mandates that there be a free flow of information from all sources, including utilities, without governmental invasion of utility bills to ban what it considers to be a utility's position on controversial public policy matters. Therefore, Amici Curiae respectfully submit that the judgment of the Court of Appeals of New York should be reversed.

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